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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUPAGE BANK AND TRUST COMPANY,
as Trustee of Trusts Nos. 2602 and 2439,

Petitioner,

VS.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

The question is whether Illinois may impose taxes contrary to decisions of the Supreme Court of the United States. Illinois is imposing a real estate tax on the subject property at a rate of 26 times that imposed on other nearby property. The parties have admitted that both properties are substantially similar in character and of equal value, but differently classified. The Petitioner contends the tax is unconstitutional. It is the *de facto* policy of the State of Illinois that Equal Protection does not require a comparison of tax burdens between classes.

RULE 28.1 DISCLOSURE

The Petitioner, DuPage Bank and Trust Company of Glen Ellyn, Illinois, is a mere title holding nominee of an Illinois land trust. The taxpayers of the instant tax were Illinois Institute of Technology, the contract seller; the bankruptcy estate of Frank J. Kafka, successor to the contract purchaser; and Sears Bank and Trust Company of Chicago, the mortgage holder.

In 1981 DuPage Bank had no parents, affiliates or subsidiaries. It is now owned by First Wisconsin National Bank of Milwaukee, Wisconsin.

Illinois Institute of Technology is a private university organized as a not-for-profit organization.

In 1981 Sears Bank was owned by a holding company, Midland Bank Corp. Since that time Sears Bank has changed its name to UnibancTrust Company of Chicago, and it is now owned by a holding company, Unibanc, Corp.

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PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

The Petitioner, DuPage Bank and Trust Company, as Trustee, respectfully prays that a Writ of Certiorari issue to review the decision of the Appellate Court of Illinois issued on December 31, 1986.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 151 Ill. App. 3d 624, 502 N.E.2d 1250 (1986). (Appendix, page 1a). The Judgment Order of

the Circuit Court of the Nineteenth Judicial District, McHenry County, Illinois, is unpublished. (Appendix, page 11a). The order of the Property Tax Appeal Board of the Illinois Department of Revenue is unpublished. (Appendix, page 15a). The notice of the decision of the Illinois Supreme Court denying leave to appeal is unpublished. (Appendix, page 18a).

JURISDICTION

The opinion of the Appellate Court of Illinois, Second District, was filed December 31, 1986. A Petition for Rehearing was denied February 9, 1987. The Supreme Court of Illinois denied Petitioner leave to appeal on June 4, 1987.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The instant Petition for a Writ of Certiorari is being filed within 90 days of the denial of the petition for leave to appeal by the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This matter involves the constitutionality of a real estate tax. It is necessary to briefly review the assessment procedure.

Real estate in Illinois which is not used for public or charitable purposes is subject to a real estate tax. Each parcel is assessed by a local township assessor. Illinois has several assessment classifications which essentially classify real estate according to character so that the same formula or method of assessment will be applied by the assessor as he assesses all properties within the class. For example, the same formula for assessments is applied to all lands classified as farm lands. A different formula is applied to lands classified as open space.

Once all the assessments for all parcels in all classes within the township are completed, then the real estate tax is imposed on the assessments so that a $10,000 assessment will generally yield ten times as much tax as a $1,000 assessment.

If the taxpayer cannot settle his assessment with local officials he may file a petition with the Property Tax Appeal Board of the Illinois Department of Revenue. Hearing on the petition is an administrative hearing *de novo*.

The taxpayer's county and township are named respondents. They must defend their proposed assessment.

In this case the taxpayer filed a petition to contest the 1981 assessment on a 107 acre parcel of land located adjacent to a highway in the City of Crystal Lake. It was not subdivided. It had some old, abandoned buildings on a portion of the land, but for all purposes relevant to this case, it was undeveloped land. No building permit could

be obtained without subdivision. The property generally had commercial and mixed use zoning designations, but subject to various contingencies and planned unit development requirements. The zoning was neither final nor firm.

The taxpayer contended in its petition that its tax was unconstitutional because the taxpayer's undeveloped land was being taxed 26 times higher per acre than other similar undeveloped lands in the township. Without denying that the other undeveloped lands were similar to the subject, the County answered that the taxpayer could not compare its land to those other lands because the other lands were properly in different assessment classifications. Whether they were, in fact, similar properties was not considered by the County in determining the tax.

To defend its proposed assessment, the County offered proof of the recently recorded sale price of a nearby 66 acre parcel of undeveloped land on a major highway in the township with superior firm industrial zoning and which land qualified for a building permit without subdivision. The County contended that the second parcel and the subject were highly similar in character and that proof of the sale price per acre of this second parcel should be used to estimate the value of the subject, with an assessment to be imposed on the subject on the basis of the estimated value.

The taxpayer admitted that the two parcels were nearly identical. The taxpayer submitted for the record the actual tax imposed on the County's comparable to compare it to the proposed tax on the subject. The subject's proposed tax burden was 26 times greater per acre than the County's comparable. The estimated tax of the subject was $557.90 per acre, but the tax of the comparable was only $21.00 per acre. Respondents offered no evidence of assessments or tax burdens on any other properties to compare to the subject.

The County objected to the taxpayer's comparison of taxes contending the Board could not consider the two properties as "comparable" for imposing a tax unless they were in the same class.

It is uncontested that the two parcels are properly in different assessment classes, and that they are, in fact, substantially similar in character and of the same value per acre.

Because the two properties were so similar, the County proposed to set the subject's assessment based on an estimated sale price derived from this comparable parcel. However, it did not base the assessment of the comparable on its own sale price because a different formula was being used in that class.

At the hearing the hearing officer ruled that the local assessor could be cross-examined on whether he had attempted to assess uniformly. Notwithstanding the ruling, the State's Attorney directed him not to answer the question.

The taxpayer's counsel argued orally that the tax was unconstitutional as a denial of Equal Protection and filed a brief on the constitutional issue. The brief was part of the record before the Board. The State's Attorney declined to argue the constitutional question at the hearing and filed no brief for the County.

The Board issued a two page opinion ruling in favor of the County's proposed assessment. The opinion noted the taxpayer had contended its tax was unconstitutional, but overruled the objection without comment. (Appendix, page 15a).

The taxpayer filed an appeal in administrative review with the Circuit Court for McHenry County. The Circuit Court reversed the Department of Revenue; declared the

subject tax unconstitutional; and entered judgment for the taxpayer for a ratable tax. (Appendix, pages 12a-13a). The Circuit Court's opinion relied on the decision of the Supreme Court of the United States in the case of *Walters v. City of St. Louis*, 347 U.S. 231, 237, 98 L. Ed. 660, 665 (1954), as controlling. *Walters* addressed classification vis-a-vis taxation, holding that Equal Protection requires that "different [tax] treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." The Illinois Attorney General, on behalf of the Department of Revenue, then filed an appeal with the Appellate Court of Illinois contending, *inter alia*, that Equal Protection never requires a comparison of the tax burdens between similar, but differently classified, properties.

In both written and oral arguments before the Appellate Court, the taxpayer's counsel argued that the Appellate Court was obliged to follow the Supreme Court of the United States in *Walters*, and to determine whether the tax disparity between properties admitted to be substantially similar, was so great as to be arbitrary.

Without mentioning *Walters*, the Appellate Court reversed the Circuit Court and ruled that Equal Protection does not require Illinois to compare tax burdens between classes. (Appendix, page 7a).

The taxpayer petitioned for a rehearing, specifically directing the attention of the court to the fact that the Appellate Court's decision does not account for the *Walters* decision and cannot be reconciled to the *Walters* decision. The petition for rehearing was denied.

The Illinois Supreme Court has never decided an Equal Protection classification case with the issue present here. The taxpayer petitioned the Illinois Supreme Court for leave to appeal noting in the petition that the Appellate Court had ignored the *Walters* decision. The Illinois Supreme Court denied leave to appeal.

The present state of the law in Illinois is that a taxpayer has no Equal Protection claim to contest a grossly disparate tax burden for property substantially similar to other property in the district but properly in a different class. A tax 26 times higher per acre has been ruled constitutional, literally as a matter of pure form over substance. The form of the classification wholly controls the tax. The substance of similarities between the properties has been ruled irrelevant.

Many other issues were litigated below which are not appealed here.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

EQUAL PROTECTION REQUIRES THAT ONCE PROPERTIES HAVE BEEN CLASSIFIED FOR PURPOSES OF TAXATION, THAT THE TAX TREATMENT, RELATIVE TO THE DIFFERENCE IN CLASSIFICATION, BE NOT SO DISPARATE AS TO BE WHOLLY ARBITRARY. ILLINOIS SHOULD NOT BE ALLOWED TO IGNORE THE CONSTITUTION AND DECISIONS OF THIS COURT AND BE PERMITTED TO TAX ADMITTEDLY SIMILAR PROPERTIES WITH AN ARBITRARY DISPARITY OF 26 TIMES.

This case has been a six year test case by Illinois to expand the State's right to impose real estate taxes any way it sees fit. It has patently ignored the Constitution and failed to recognize a decision of the Supreme Court of the United States in the case of *Walters v. City of St. Louis*, 347 U.S. 231, 237, 98 L. Ed. 660, 665 (1954). That case is not recognized as law in Illinois.

In *Walters* the Supreme Court interpreted Equal Protection to require that if similar subjects have been prop-

erly classified in different taxable classifications, then the tax authorities must compare the extent of those similarities to determine whether they justify the difference in tax burden. If the disparity between the two tax burdens for similar, but differently classified subjects, is so great as to be arbitrary, then the higher tax is unconstitutional, and the taxpayer will be entitled to a reasonably similar tax burden. The Supreme Court declared that Equal Protection under the Fourteenth Amendment requires that:

> "different [tax] treatments be not so disparate relative to the difference in classification, as to be wholly arbitrary." *Ibid.*

It is difficult to imagine a clearer directive to apply to this case. *The taxpayer has not found a single case in any jurisdiction where the disparity in tax burdens for similar properties was so vast as to charge one taxpayer 3.8% (1/26th) of the tax imposed on another taxpayer.* Since the subject and the County's comparable are admitted by the parties to be similar, in fact, the *Walters* case demands that the extent of the tax disparity be studied, and if it is too great considering the similarities, then the higher tax is constitutionally void.

It should be noted that the *Walters* test poses no threat to any kind of classification. It does not require that similar lands must have the same classification or even the same system of classification. It does not require that the tax burdens be identical or precisely uniform between similar classes. The legislature does have broad authority, unimpeded by *Walters*, to develop multiple classifications and systems. The legislature has authority to tax certain classes at somewhat higher levels than others. The Supreme Court has consistently endorsed the concept of allowing the legislature wide latitude in these matters both prior to and after its *Walters* decision. *Nashville, Chattanooga, and St. Louis Railway v. Browning,* 310

U.S. 362, 368, 84 L. Ed. 1254, 1257 (1940), and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 35 L. Ed. 2d 351, 355 (1973), *rehearing denied*, 411 U.S. 910.

Walters goes beyond the underlying system of classification and studies the tax, itself. It requires that once similar subjects have been properly classified in different classes, and once their assessments have been properly determined per the mode for their respective classes, then at that point, Equal Protection requires that their respective tax burdens, no matter how they are determined, must be compared to determine whether the disparity is so grossly disparate as to be arbitrary. If it is, then the higher tax is unconstitutional, and the taxpayer will be entitled to a reasonably similar lower tax burden.

The Illinois Supreme Court has indirectly addressed this issue twice in *obiter dicta*, both favorably to this taxpayer.

In one case owners of a golf course complained of overassessment when their land was being assessed in a range of $525 to $575 per acre while adjoining farm lands were being assessed in a range of $150 to $363 per acre. The Illinois Supreme Court studied the substance of the actual differences between the two classes to determine whether the disparity between the classes was justified. It found the golf course had significant improvements (sprinkler system, etc.) installed at considerable expense which had substantially enhanced the value of the golf course beyond the value of the farm land. Then the court, after considering the differences, determined that the disparity in the tax burden was not arbitrary but was based on real factors of substantial differences between the properties. *People ex rel. Toman v. Olympia Fields Country Club*, 374 Ill. 101, 103, 28 N.E.2d 109 (1940).

In the instant case the Appellate Court failed to apply either the *Walters* or *Olympia Fields* analysis. The Court

erroneously believed that Equal Protection never requires an analysis *between* classes, but only *within* a class. This interpretation of Equal Protection cannot, under any circumstances, be reconciled to the requirements of *Walters* and *Olympia Fields* to determine whether the difference in tax burden *between* classes is arbitrary.

Further, the Illinois Supreme Court spoke directly to the issue of comparison *between* classes as a subject for Equal Protection scrutiny in 1954, the year of *Walters*. The Illinois Court was called upon to determine whether a taxpayer had an unconstitutional tax burden because it had to pay somewhat higher personal property taxes for its similar, but differently classified, property. The Court studied the difference in the tax burden and declared that the difference was not disparate enough to raise an Equal Protection claim, but went on to declare, in *dictum*, that if the tax disparity would have been "substantial", then the taxpayer would have an unconstitutional tax under the Fourteenth Amendment. It is apparent the Court did, in fact, apply the *Walters* type of analysis, but the taxpayer did not have a "substantial" disparity as we do here. *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 488, 489, 119 N.E.2d 215 (1954).

The Court went on in further *dictum* at 488, to declare that the Equal Protection clause of the Fourteenth Amendment guarantees "substantial equality in the resulting [tax] burden" but not identity. A taxpayer would have no Fourteenth Amendment claim to contest his tax until the difference in tax burden became "substantial."

The Illinois Department of Revenue and the Appellate Court here mistakenly believed that Equal Protection *never* requires such an analysis between classes.

The law is clear from the Supreme Court's directive in *Walters* that such an analysis must be applied where there

is a gross disparity as is present here. Further, the tests applied by the Illinois Supreme Court in *Olympia Fields* and *Warren Petroleum* are substantially the same analysis the Supreme Court of the United States applied in *Walters*.

In none of the three cases did the taxpayer prove a gross disparity in the tax. However, the Supreme Court of the United States has decided a case with a gross tax disparity where it specifically adopted a substance over form test for Equal Protection in an Illinois revenue dispute, *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, 509, 71 L. Ed. 372 (1926):

> " '. . . when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.' "

In that case the Supreme Court declared unconstitutional an Illinois tax when foreign insurance companies were being charged an occupation tax based on 100% of net receipts, but domestic insurance companies were classified separately and only taxed on a basis of 30% of net receipts. The Court was not concerned with the form of the two classifications but looked directly to the substance of what was being taxed and determined that Equal Protection would not allow such tax discrimination between the two classes which were substantially similar. *Id.* at 516.

Here, the Circuit Court declared the tax disparity of 26 times to be unconstitutional under both the *Walters* test and the *Hanover* holding because the subject land and the comparable land were so similar. That judgment

should have been affirmed by the Appellate Court and should be reinstated by the Supreme Court.

The Supreme Court should grant certiorari and reverse the Appellate Court on the constitutional issue to serve notice on Illinois that it is not exempt from the mandate of the Constitution or the directives of the Supreme Court on the issues of Equal Protection and taxation. The Illinois assessment officials from the local assessor to the Department of Revenue have each demonstrated an attitude that the best way to handle a constitutional objection by a taxpayer is to simply ignore the objection, to refuse to address it at a hearing, and to decline to directly rule on its merits. A constitutional system will not tolerate such arrogance in the use of their power by those public officials charged with upholding the Constitution. These officials are not immune from constitutional accountability. Their collective activities pose a dangerous corruption of the power to tax by the State of Illinois. They have refused to recognize the Constitution in determining the instant tax.

A tax at a level 26 times that charged for nearly identical property in the district is so excessive and oppressive as to deny Equal Protection, all as prohibited by the Fourteenth Amendment to the Constitution.

CONCLUSION

The Petitioner prays that this Court grant the Petition for a Writ of Certiorari and, upon review, reverse the decision of the Appellate Court of Illinois and reinstate the judgment of the Circuit Court for the taxpayer on the constitutional issue.

Respectfully submitted,

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APPENDIX

(Filed December 31, 1986)

Nos. 2-85-509, 2-85-542 consolidated

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DuPAGE BANK & TRUST COMPANY, as Trustee of Trusts No. 2602 and 2439,

Plaintiff-Appellee,

vs.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW; THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Defendants-Appellants.

Appeal from the Circuit Court of McHenry County.
No. 84 MR 0056
Hon. **Roland A. Herrmann,** Judge Presiding.

Presiding Justice NASH delivered the opinion of the court:

Defendant, the Property Tax Appeal Board (PTAB) appeals from a judgment of the circuit court which, on administrative review, reversed a decision of the PTAB upholding the 1981 assessment of property held by the plaintiff, the DuPage Bank & Trust Company, as trustee. The PTAB contends the trial court erred in finding: (1) the assessment violated the constitutional requirement of uniformity of taxation; and (2) that the subject property was entitled to a farmland classification.

The subject property is a 107-acre parcel consisting of two tracts, 36.75 acres and 71 acres, located in a commercial/industrial area in the city of Crystal Lake. The south one-quarter of the property is improved with buildings once used by the Illinois Institute of Technology and McHenry County College, but abandoned since 1973. From July 1, 1980 to July 1, 1982, the 36.75 acre tract was zoned PUD Commercial and the 71 acre tract PUD for other uses.

The property was assessed at $540,520 for 1981, and plaintiff appealed to the McHenry County Board of Review for a reduction of the assessment and for a farmland classification as provided in section 20e of the Revenue Act of 1939 (Ill.Rev.Stat.1981, ch. 120, par. 501e). The board of review denied the requested relief, but adjusted the assessment to $476,060 to correct an error in the amount of acreage.

Plaintiff appealed the land assessment ($456,060 attributable to land and $20,000 attributable to improvements) to the PTAB and a hearing *de novo* was held on December 3, 1982. Plaintiff argued that the assessed valuation of the subject property was 26.5 times that of similar properties and offered three parcels as comparables: a 70.44 acre farm assessed at $21,400 as farmland; a 134 acre golf course assessed at $52,280 as open space; and a 66.28 acre farm assessed at $19,890 as farmland. Plaintiff also submitted a photograph of the subject property taken in November 1982, showing a corn crop on it.

The Algonquin Township Assessor testified that the fair market value of the subject property on January 1, 1981 was $2.7 million. The assessor based his valuation upon sales of comparably zoned property with road frontage and upon his estimation that it would take approximately 10 years to improve the property to its optimum market value. The assessor also testified that he was familiar with the subject property and had not observed any farming of it for 10 years prior to 1982, at which time the property had been planted with corn.

The PTAB found that the assessment was proper and plaintiff sought administrative review of that decision in the circuit court of McHenry County. The trial court found that the U.S. Constitution requires uniformity of taxation irrespective of the classification of property and that the property had not been uniformly assessed as compared with the other properties submitted. The circuit court also determined that the PTAB's finding that no farming had taken place on the property until 1982 was contrary to the manifest weight of the evidence and that it was entitled to a farmland classification. The court reversed the decision of the PTAB and reduced the assessment of plaintiff's property from $4,262 to $304 per acre. The PTAB appeals.

We consider first the PTAB's contention that the circuit court erred in reversing the PTAB's finding that the property was not entitled to a farmland assessment.

A determination by an administrative agency will not be disturbed upon review unless contrary to the manifest weight of the evidence. (*Citizens Utilities Co. v. Department of Revenue* (1986), 111 Ill.2d 32, 47, 94 Ill.Dec. 737, 488 N.E.2d 984; *Cherry Bowl, Inc. v. Property Tax Appeal Board* (1981), 100 Ill.App.3d 326, 328, 55 Ill.Dec. 472, 426 N.E.2d 618; *Robinson v. Property Tax Appeal Board* (1979), 72 Ill.App.3d 155, 156, 28 Ill.Dec. 583, 390 N.E.2d 942.) In order to qualify for assessment as farmland, real property must have been used as a farm for the two years preceding the tax year in question. (Ill.Rev.Stat.1981, ch. 120, par. 501e.) Section 1(25) of the Revenue Act of 1939 defines "farm" with reference to certain enumerated farming activities, such as the growning of crops and the raising of livestock. (Ill.Rev.Stat.1981, ch. 120, par. 482(25).) In determining whether property is entitled to a farmland classification for assessment purposes, the focus is on the present use of the property. *Santa Fe Land Improvement Co. v. Illinois Property Tax Appeal Board* (1983), 113 Ill. App.3d 872, 875, 69 Ill.Dec. 708, 448 N.E.2d 3, *appeal denied.*

At the hearing before the PTAB, the township assessor testified that he was familiar with the subject property and had not observed any farming activity on it for the ten years prior to 1982. The only evidence of farming submitted by the plaintiff was a photograph taken in 1982 showing a corn crop on the property. No evidence was presented to establish that the property had been farmed in 1981, the tax year in question. Counsel for the plaintiff stated to the PTAB that farming had been "intermittent" and that for some years, including 1981, the property had been allowed to lie fallow. We conclude the trial court erred in finding that the PTAB's denial of a farmland classification was contrary to the manifest weight of the evidence.

Plaintiff also argues that fallow lands should be classified at farmland, and represents that it is a practice in McHenry County to assess fallow lands as farmland. However, the Revenue Act does not contain an exception for fallow lands and, in any event, no evidence was offered to support the conclusion that the subject property was farmed prior to 1981 and then allowed to lie fallow as a farming practice. Moreover, plaintiff's representations as to local assessment practices are *dehors* the record, and thus do not constitute support for his argument. We conclude that the circuit court erred in applying a farmland classification to the property and in reducing the assessed valuation on that basis.

The PTAB next contends that the trial court erred in finding that the subject property was not assessed in accordance with the constitutional principle of uniformity of taxation, which requires that like property be equally taxed in proportion to value. (*Apex Motor Fuel Co. v. Barrett* (1960), 20 Ill.2d 395, 401, 169 N.E.2d 769; *People ex rel. Wangelin v. Wiggins Ferry Co.* (1934), 357 Ill. 173, 180, 191 N.E. 296.) Plaintiff argues that classification is irrelevant to the achievement of uniformity of taxation, and states that the assessed valuation of the subject property is 26.5 times that of similar parcels which are classified as farmland or open space.

The 1970 Illinois Constitution contains a uniformity clause which provides:

> "Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law." (Ill. Const. 1970, art. IX, §4(a)).

The 1870 Illinois Constitution contained a similar provision (Ill. Const. 1870, art. IX, § 1). Our supreme court has determined that the clause requires only that taxation be uniform as to the class upon which it operates. (*People ex rel. Bosworth v. Lowen* (1984), 102 Ill.2d 242, 248, 80 Ill.Dec. 70, 464 N.E.2d 1053; *Hoffmann v. Clark* (1977), 69 Ill.2d 402, 423, 14 Ill.Dec. 269, 372 N.E.2d 74.) Since the subject property bore a different tax classification than the parcels which plaintiff offered as comparable, it has not been shown that the assessment offended the Illinois constitution.

Plaintiff also contends that the disparity between the assessed valuation of the subject property and the other "comparables" offends the Equal Protection Clause of the United States Constitution. (U.S. Const., amend. XIV, § 1.) The threshold inquiry in equal protection analysis is whether similarly situated persons are treated dissimilarly. (*Eisenstadt v. Baird* (1972), 405 U.S. 438, 446-47, 92 S.Ct. 1029, 1034-35, 31 L.Ed.2d 349; *Jenkins v. Wu* (1984), 102 Ill.2d 468, 477, 82 Ill.Dec. 382, 468 N.E.2d 1162; *People v. Sampson* (1985), 130 Ill.App.3d 438, 445, 85 Ill. Dec. 403, 473 N.E.2d 1002.) The United States Supreme Court has held that the States may classify property for taxation purposes, provided equality is accorded to all members of the same class. (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351; *Nashville, Chattanooga & St. Louis Ry. v. Browning* (1940), 310 U.S. 362, 368, 60 S.Ct. 968, 971, 84 L.Ed. 1254.) The Illinois Supreme Court has also noted that, "It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth

amendment imposes no 'iron rule' of equal taxation." *Department of Revenue v. Warren Petroleum Corp.* (1954), 2 Ill.2d 483, 489-90, 119 N.E.2d 215.

Plaintiff does not contest the constitutionality of the statutes establishing farmland and open space classifications and, as we have determined, the subject property was not entitled to a farmland classification. Since plaintiff's property and the parcels offered as comparables bore different tax classifications, they may properly be assessed and taxed differently without offending the equal protection clause.

In support of his argument that equal protection requires uniformity of taxation irrespective of classification, plaintiff relies on the United States Supreme Court decisions in *Concordia Fire Insurance Co. v. Illinois* (1934), 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411, and *Hanover Fire Insurance Co. v. Carr* (1926), 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372. Plaintiff argues that these decisions mandate uniformity of taxation for all kinds of property, however classified. We do not agree.

In the *Concordia* case, the net receipts of foreign insurance companies were assessed at a different rate than other personal property. The Supreme Court held that this practice violated the equal protection clause because there was no reasonable basis to discriminate against this species of personal property. (292 U.S. 535, 54 S.Ct. 830; see *National-Ben Franklin Fire Insurance Co. of Pittsburgh v. Brenza* (1952), 411 Ill. 337, 342-43, 104 N.E.2d 218.) In the *Hanover* case, the Court also found that dissimilar tax treatment of property *of the same class* offended the equal protection clause. (272 U.S. 494, 516, 47 S.Ct. 179, 185.) Contrary to plaintiff's assertion, in neither case did the United States Supreme Court state that the equal protection clause mandates uniformity of taxation irrespective of classification. The Illinois Supreme Court has said that the fourteenth amendment requires no more than uniformity among members of the same class (*People ex rel. Miller v. Doe* (1961), 22 Ill.2d 211, 219, 174

N.E.2d 830), and that rule will be applied here. We conclude that the assessment of the subject property did not offend the equal protection clause.

Plaintiff next contends that the assessment was improper under the doctrine of constructive fraud. Fraud must be established by clear and convincing evidence. (*In re Application of Rosewell* (1985), 106 Ill.2d 311, 318, 88 Ill.Dec. 28, 478 N.E.2d 343; *Clarendon Associates v. Korzen* (1973), 56 Ill.2d 101, 104, 306 N.E.2d 299; *People ex rel. Rosewell v. Dee El Garage, Inc.* (1977), 51 Ill.App.3d 382, 385, 9 Ill.Dec. 328, 366 N.E.2d 585.) Deliberate misconduct by the assessor need not be shown. (*People ex rel. Skidmore v Anderson* (1974), 56 Ill.2d 334, 339, 307 N.E.2d 391.) In *People v. International Business Machines Corp.* (1982), 89 Ill.2d 287, 293, 59 Ill.Dec. 923, 926-27, 432 N.E.2d 867, 870-71, constructive fraud in assessments was described as follows:

> "Some guidelines have been established for the proof necessary to establish constructive fraud. Assessments that are disproportionately higher than those for similar property or assessments that are based on the assessor's own private opinion showing a lack of knowledge or a lack of honest judgment are indicative of constructive fraud. (*Clarendon Associates v. Korzen* (1973), 56 Ill.2d 101, 104-05 [306 N.E.2d 299]; *People ex rel. Nordlund v. Lans* (1964), 31 Ill.2d 477, 479 [202 N.E.2d 543]; *Aldrich v. Harding* (1930), 340 Ill. 354, 358 [172 N.E. 772]; *People ex rel. Carr v. Stewart* (1924), 316 Ill. 35, 30 [145 N.E. 6000].) Similarly, overvaluation may be so excessive, under some circumstances, as to justify the conclusion that it was not honestly made and, therefore, is constructively fraudulent. (*Clarendon Associates v. Korzen* (1973), 56 Ill.2d 101, 104-05 [306 N.E.2d 299]; *People ex rel. Paschen v. Hendrickson Pontiac, Inc.* (1957), 12 Ill.2d 477, 480 [147 N.E.2d 29]; *People ex rel. Callahan v. Gulf, Mobile & Ohio R.R. Co.* (1956), 8 Ill.2d 66, 69-70 [132 N.E.2d 544].)"

Plaintiff states that there here exists a 2650% disparity between the assessment levels of the subject property and similar property and, in support of his argument, has compared the 1981 assessed valuations and 1981 taxes for the respective parcels to find the disparity.

In analyzing such a case, our courts have first required that the property selected for comparison purposes be similar in kind and character and be similarly situated. (*People ex rel. Johnson v. Robinson* (1950), 406 Ill. 280, 285, 94 N.E.2d 151; *People ex rel. Toman v. Olympia Fields Country Club* (1940), 374 Ill. 101, 103, 28 N.E.2d 109; *People ex rel. Wangelin v. Wiggins Ferry Co.* (1934), 357 Ill. 173, 181, 191 N.E. 296.) The "comparables" relied upon by plaintiff did not meet this test because they bore different tax classifications than the subject property. Two of the parcels were assessed as farmland and one as open space, in accordance with sections 20e and 20g-1 of the Revenue Act of 1939, respectively, (Ill.Rev.Stat. 1981, ch. 120, pars. 501e, 501g-1). These sections of the statute designate that such lands may be valued on the basis of their use as farmland and open space rather than by fair cash value, which is the basis upon which real property is normally assessed under section 20 (Ill.Rev.Stat. 1981, ch. 120, par. 501), and was the basis upon which the subject property was assessed. Also, farmland is assessed in part on the basis of its productivity. (Ill.Rev.Stat. 1981, ch. 120, par. 501e.) The fact that farmland and open space are assessed on a different basis than other real property reflects a recognition by the General Assembly that such property is distinct from other real property and is entitled to special treatment. (See *Hoffmann v. Clark* (1977), 69 Ill.2d 402, 425-27, 14 Ill.Dec. 269, 372 N.E.2d 74.) It follows that specially classified property is not "comparable" with other real property because the manner in which its value is determined for tax purposes is different. The respective assessment levels, which are proportionate to fair market value, cannot be compared. We conclude plaintiff has not established fraud by comparing the assessed valuation of its property with that of property classified as farmland or open space.

Plaintiff also argues that the valuation of his property was so excessive that fraud must be inferred. Our supreme court has stated that the taxpayer alleging excessive valuation must show that the property has been assessed at a valuation grossly in excess of its market value. (*People v. Wilson* (1937), 367 Ill. 494, 498, 12 N.E.2d 5; *People ex rel. Wangelin v. Wiggins Ferry Co.* (1934), 357 Ill. 173, 179, 191 N.E. 296.) The only evidence offered in the present case is that the fair market value of the subject property on January 1, 1981 was $2.7 million dollars and its assessed valuation was $476,060. Thus, the subject property was assessed at approximately 17%, which the record shows was the county wide assessment median. The record fails to support plaintiff's assertion that the valuation of its property was fraudulently excessive.

Last, plaintiff contends that the assessment of its property was improper because the township assessor speculated as to its value if it were improved in accordance with its PUD designation. A valuation is speculative and arbitrary if based upon the happening if an uncertain event rather than upon what the property would fairly and reasonably bring at a present fair sale. (*People ex rel. Rhodes v. Turk* (1945), 391 Ill. 424, 428, 63 N.E.2d 513; *People ex rel. Wangelin v. Wiggins Ferry Co.* (1934), 357 Ill. 173, 181, 191 N.E. 296.) In *Wiggins*, waterfront property was improperly valued as a possible industrial site even though there had been no such development in the area and no offers to buy the property.

In the present case, the record shows that when the subject property was assessed as of January 1, 1981, it bore a PUD designation, in part PUD Commercial. The township assessor testified that he based his valuation on sales of comparably zoned property also having road frontage. Plaintiff did not offer any contrary evidence of fair market value. We conclude the assessor's valuation was not speculative, as it was based upon valid factors existing at the time of the assessment.

Accordingly, as the decision of the PTAB was not against the manifest weight of the evidence, the judgment of the circuit court will be reversed.

REVERSED.

REINHARD and WOODWARD, JJ., concur.

(Dated June 6, 1985)

State of Illinois
County of McHenry—ss

IN THE CIRCUIT COURT
OF THE 19TH JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

No. 84 MR 0056

DuPAGE BANK AND TRUST COMPANY, as Trustee of Trusts No. 2602 and 2439,

Plaintiff,

vs.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW; THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Defendants.

JUDGMENT ORDER

This cause came on to be heard pursuant to the Administrative Review Act (*Ill. Rev. Stat.*, Chpt. 110, § 3-101 *et seq.*) for a judicial review of the 1981 assessments on a 107 acre parcel of land in the City of Crystal Lake, Illinois. The assessments are appealed by the taxpayer from the Illinois Property Tax Appeal Board (PTAB) which conducted a hearing *de novo* on December 3, 1982, and rendered its decision on May 17, 1984, under Consolidated Dockets 81-3200-F-2 and 81-3201-F-2. The County's tax

index numbers for the parcels are 19-05-426-003-0030 and 19-05-476-008-0060.

This is an appeal of the "land" assessments. There is no appeal and no contest as to the "improvements" assessments.

The facts in this case are largely uncontested. The issues involve questions of law and whether the PTAB correctly applied the law to the facts of the case. In Administrative Review upon questions of law, the Court may review the legal effect of those facts. For this reason, a summary of the propositions of law and facts in the record is necessary (as allowed by *Ill. Rev. Stat.*, Chpt. 110, § 3-111[c]).

The taxpayer contended that as a matter of law the U.S. Constitution requires uniformity of assessments and a ratable tax burden for all properties in the district that are comparable by the standard criteria used to appraise real estate—such as zoning, location, topography, soils, drainage, etc.

The taxpayer and the County suggested certain parcels that were comparable to the subject, one being directly across the street from the subject. The taxpayer then submitted the assessments on those comparable properties. The disparity in the tax burden is approximately 2600%.

It is uncontested that the PTAB assessed the subject based solely on the township assessor's estimate of the subject's projected sale price, yielding an overall assessment of $4,262 per acre. The admitted comparable properties were assessed at a flat rate of approximately $300 per acre. The justification given by the State for this discrepancy was that the subject was technically in a different "class" from the comparables. The County did not submit for the record a single assessment of any other property for comparison.

The taxpayer contended that this method of assessment constitutes an error of law in that the gross disparity in the tax burden on admittedly comparable (but different-

ly classified) properties denies the instant taxpayer of Equal Protection as well as various other constitutional guarantees. The PTAB rejected those legal objections.

This Court finds that those objections should have been sustained as a matter of law. The U.S. Supreme Court has addressed classification vis-a-vis taxation and ruled that Equal Protection requires that "different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary". *Walters v. City of St. Louis*, (1954), 74 S.Ct. 505, 347 U.S. 231, 237, 98 L.Ed. 660, 665. Further, Equal Protection requires that "Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment on the taxable value". *Concordia Fire Insurance v. Illinois*, (1933) 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411. Illinois revenue collections are also subject to providing the same reductions and debasements of assessment levels so as to provide substantial equality in the tax burden. *Hanover Fire Insurance v. Carr* (1926) 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372. For these reasons, this Court finds that because the subject was essentially comparable to the other properties submitted, that the U.S. Constitution requires that the subject bear a ratable tax burden regardless of what technical classification it may bear.

The taxpayer also argued in the alternative that it was entitled, as a matter of law, to be classified as a "farm" under *Ill. Rev. Stat.*, Chpt. 120, § 482 (25).

At various places in the taxpayer's Complaint and brief to the PTAB and in the transcript of the hearing before PTAB, the taxpayer demonstrated a history of farming. The finding of fact by the PTAB that "no farming activity of any kind had taken place on the subject until 1982", is not supported by the record and is contrary to the manifest weight of the evidence.

This Court finds that the subject should have been classified as a "farm" and assessed accordingly.

The Court further finds that under both of the taxpayer's theories, as a matter of law, it is entitled to an assessment in the range of $300 per acre.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the decision of the Illinois Property Tax Appeal Board of May 17, 1984, is reversed and vacated, and that the taxpayer, DuPage Bank and Trust Company, as Trustee of Trust No. 2602 and 2439, has judgment herein.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the 1981 land assessment for the subject be entered on the agriculture assessment rolls as follows:

Parcel 19-05-426-003-0030 at $304 per acre
Parcel 19-05-476-008-0060 at $304 per acre.

DATED: June 6, 1985

ENTER: /s/ ROLAND A. HERRMANN
Judge

(Dated May 17, 1984)

PROPERTY TAX APPEAL BOARD'S DECISION

APPELLANT DuPage Bank & Trust, et al
DOCKET NO. 81-3200-F-2 and 81-3201-F-2
PARCEL NO. See reverse side

The subject property consists of a 107 acre tract of land located in Crystal Lake, McHenry County, Illinois. The subject is improved with five buildings containing some 95,000 square feet. The appellant contends that the subject property, which is comprised of two parcels, should be granted a farm assessment.

Appearing on behalf of the appellant were Mr. William Franz and Ms. Sandra Kerrick, attorneys at law. Mr. Franz presented a memorandum of law in support of his contention. He argued that the present assessments on the subject property violates the constitutional requirement of uniformity of taxation. He contended that a tax burden on the subject at a level 26 times that of a comparable property is unconstitutional. Mr. Franz next argued that the subject parcel has been unreasonably and illegally classified for assessment purposes. Thirdly, the appellant maintained that the assessments on the subject property are violative of the constitutional requirement that the level of assessment rate cannot be more disparate than 2½ times. Fourthly, Mr. Franz argued that the present classification of the subject parcel was based on speculation. He contended that the board of review assumes that the subject will one day be used as an income producing property. The appellant also argued that the assessments violate due process and equal protection as guaranteed under the United States Constitution. Finally, the taxpayer maintained that the assessments are so disparate as to constitute constructive fraud.

The board of review was represented by its three members, Mr. Robert Eickstadt, Mrs. Bernadine Darling, and Ms. Iola Desmond, Mr. Randall Woloski, Supervisor of Assessments, Mr. David Stone, Assistant State's Attorney and Mr. Robert Kunz, Algonquin Township Assessor. Mr. Kunz testified that in his opinion the subject parcels had a fair market value of $2,700,000 on January 1, 1981. He also stated that he has frequently observed the subject property. He testified that the subject is located on a route he often takes. With regard to both parcels, the witness stated that he had never observed any farming activity until 1982, at which time the subject was tilled and planted with corn. On cross-examination of Mr. Kunz, the appellant made a motion to strike all of the testimony with regard to the valuation of the subject property.

After hearing the testimony and reviewing the record, the Property Tax Appeal Board finds that it has jurisdiction over the parties and the subject matter of this appeal.

The Board further finds that the subject property's present assessments, as set forth in the appellee's evidence, are proper. The Board notes that land is accorded preferential treatment only if the definition of "farm" is met. (Ill. Rev. Stat., Ch. 120, 482 (25)). Furthermore, under 501(e), a tract of property must have been used as a farm for the two preceding years. The assessor's testimony clearly revealed that no farming activity of any kind had taken place on the subject parcel until 1982. It should be noted that no rebuttal testimony was offered on this point. Therefore, this Board finds that the subject property is accurately assessed.

DOCKET NO.	PIN	LAND	IMPR.	TOTAL
81-3200-F-1	19-05-426-003-0030	$182,320	-0-	$182,320
81-3201-F-1	19-05-476-008-0060	$273,740	$20,000	$293,740

The State Tax Appeal Board from the facts and exhibits presented finds the decision of the McHenry County Board of Review to be correct and that the correct assessed valuation of the property is:

LAND See reverse side IMPR See reverse side
TOTAL See reverse side

Subject only to the State Multiplier as applicable.

/s/ BENNETT BRADLEY
Chairman

/s/ W. J. INGELMAN
Member

DISSENTING _____

/s/ JAKE J. RINGGER
Member

DATE 5-17-84

/s/ JOAN BUCK
Clerk

Final administrative decisions of the Property Tax Appeal Board are subject to review in the Circuit Court under the provisions of the Administrative Review Act. A complaint for such review must be filed within 35 days of the date of this decision.

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 4, 1987

Ms. Sandra Kerrick
Franz, Naughton & Leahy
453 Coventry Green
Crystal Lake, IL 60014

No. 64951—DuPage Bank and Trust Company, as Trustee, etc., petitioner, v. Property Tax Appeal Board of the Illinois Department of Revenue, et al., etc., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1987.

No. 87-289

Supreme Court, U.S.
FILED
DEC 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUPAGE BANK AND TRUST COMPANY,
as Trustee of Trusts Nos. 2602 and 2439,
Petitioner,

v.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,
Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

BRIEF IN OPPOSITION OF RESPONDENT PROPERTY TAX APPEAL BOARD OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Whether the equal protection clause of the fourteenth amendment prevents a State from imposing disparate tax burdens on parcels of real property which have been properly placed in different, legitimate classifications?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUPAGE BANK AND TRUST COMPANY,
as Trustee of Trusts Nos. 2602 and 2439,

Petitioner,

v.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

BRIEF IN OPPOSITION OF RESPONDENT PROPERTY TAX APPEAL BOARD OF THE STATE OF ILLINOIS

The respondent Property Tax Appeal Board of the State of Illinois respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Appellate Court of Illinois in this case.

STATEMENT OF THE CASE

The petitioner (hereafter referred to as the taxpayer) challenged the 1981 assessment of its 107-acre parcel of real estate by comparing the treatment of this property with the assessments of three other parcels claimed to be similar. The taxpayer's property was not entitled to be assessed as farmland or open space during the tax year at issue; however, the parcels cited for comparison purposes were assessed on the basis of their classification as farmland or open space, in accordance with Sections 20e and 20g-l of the Illinois Revenue Act of 1939, as amended, Ill. Rev. Stat. ch. 120, ¶¶ 501e, 501g-l (1985). The taxpayer has not challenged the State's right to make these classifications in its taxing statutes.

REASONS WHY THE PETITION SHOULD BE DENIED

THIS COURT'S DECISION IN *WALTERS V. CITY OF ST. LOUIS* DOES NOT PREVENT THE DISPARATE TAX TREATMENT OF PARCELS OF PROPERTY WHICH HAVE BEEN PROPERLY PLACED IN DIFFERENT CLASSIFICATIONS BASED UPON SUBSTANTIAL AND LEGITIMATE DISTINCTIONS.

By isolating a single phrase from the opinion of this Court in *Walters v. City of St. Louis*, 347 U.S. 231 (1954), the taxpayer attempts to demonstrate that equal protection not only requires a reasonable basis for legislative classification of property subject to taxation, but also man-

dates against disparate treatment of separate classes of property. The taxpayer has erroneously converted one aspect of the test for determining the legitimacy of a legislative classification into an additional and novel requirement that differently classified objects of taxation must be treated similarly in order for a taxing scheme to survive a fourteenth amendment challenge.

Equal protection principles neither require nor suggest that state legislation must accord similar treatment to members of different legislative classes, unless the classes themselves are based upon impermissible distinctions. No challenge is made in this case to Illinois' decision to classify farmland and open space differently from other real property, and its classifications are entitled to a presumption of constitutionality, *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969), which remains unrebutted in the context of this case. Thus, the taxpayer can demonstrate no error in the state appellate court's application of the fourteenth amendment, and its petition for a writ of certiorari should be denied.

1. The Taxpayer Has Misconstrued This Court's Decision In *Walters*.

In *Walters*, the appellants challenged the validity of an ordinance which separately classified wage earners and self-employed persons for taxation purposes. The objective of this Court was to determine whether this legislative distinction ran afoul of the fourteenth amendment. The classification survived this challenge, with the Court refusing to conclude that the difference between wages and profits was "insignificant or fanciful." 347 U.S. at 237. This holding was followed by the explanatory paragraph from which the taxpayer has drawn the phrase upon

which it now relies. That paragraph, quoted more fully, states that:

> [t]he power of the State to classify according to occupation for the purposes of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. (Citations omitted) "In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights." (Citation omitted; emphasis in original).

This explanation establishes the requirement that the classifications themselves be based upon meaningful distinctions, not that there be a similarity in the treatment of separate and distinct classes. The particular language upon which the taxpayers relies, the statement that different treatment should not be "so disparate, relative to the difference in classification, as to be wholly arbitrary," *id.*, serves only to protect taxpayers from unequal treatment on the basis of trivial distinctions. However, separate, legitimate classes may be treated very disparately without violating the Constitution; one class may be subject to taxation while another is completely exempt. The above language from *Walters* expressly permits such disparate treatment.[1]

---

[1] After it determined that the classifications were appropriately drawn, the *Walters* Court did not proceed to examine the extent of the disparity between tax rates applied to the separate classifications. Therefore, if the contention of the taxpayer in the present case were correct, it would be relying on a statement which was not necessary to the Court's holding and which, therefore, is not binding authority for the proposition which taxpayer asserts. *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972).

The extent of permissible disparity in tax treatment of different classes is well demonstrated by one of the cases relied upon by the *Walters* Court. In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), the Court upheld a state license tax upon chain store operators, where the legislature graduated the tax rate based in part upon the number of the stores in the chain. Depending upon the size of the chain, the license fees varied from $10.00 to $550.00 per store; thus, one individual license might cost 55 times more than another.[2]

The *Grosjean* Court's decision examined not the disparity between the tax rates as applied to each individual store, but rather the State's decision to classify chains according to the total number of operating stores. Finding that the classification rested on reasonable distinctions, the Court concluded that no constitutional violation was shown: "[t]he statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection." 301 U.S. at 424.

By misconstruing a single phrase from *Walters*, and by focusing upon the alleged similarities of its property to other parcels taxed at lower rates (although no findings as to such similarities were made by the Property Tax Appeal Board in its capacity as trier of fact), the taxpayer has ignored the meaningful, legitimate basis for the different tax treatment of allegedly comparable property: the legislative decision to encourage preservation of farmland and open space by classifying that property separately for purposes of real estate taxation and taxing it at a lower rate. *See Hoffmann v. Clark*, 69 Ill. 2d 402, 372 N.E.2d 74, 86 (1977). *See also Weissinger v. White*, 733 F.2d 802

---

[2] This disparity is more than twice that complained of by the taxpayer in the instant case.

(11th Cir. 1984). As previously noted, no challenge has been raised here with respect to the validity of these classifications. According to the *Walters* analysis, the State could, consistently with fourteenth amendment principles, decide to exempt farmland property from any tax whatever. Certainly, then, the degree of disparity between tax rates for real property cannot demonstrate the basis for a viable equal protection challenge, so long as the classifications themselves are based upon substantial differences.

The taxpayer's argument that Illinois' property tax laws conflict with the *Walters* decision is not well founded and does not present any question meriting the attention of this Court. Therefore, the petition for a writ of certiorari should be denied.

2. Other Cases Relied Upon By The Taxpayer Do Not Demonstrate That Disparate Treatment Of Different Classes Violates The Equal Protection Clause When The Classifications Themselves Are Proper.

In *Hanover Fire Insurance Co. v. Carr*, 272 U.S. 494 (1926), this Court did, as the taxpayer explains, declare unconstitutional an Illinois tax sought to be imposed on foreign corporations. What the taxpayer fails to observe, however, is that the reason for this holding was the State's impermissible classification of corporations as domestic or foreign for purposes of raising revenue. The taxpayer's statement that "[t]he Court was not concerned with the form of the two classifications . . . ," Petition at 11, is simply incorrect. *See, e.g., Hanover, supra* at 511, where the Court explained that "after its admission [to do business in Illinois], the foreign corporation stands equal, and is to be classified, with domestic corporations of the same kind." The disparate taxing scheme

examined in *Hanover* cannot be usefully compared with that at issue in the present case, where different tax rates have been applied on the basis of real and substantial differences in the properties subject to assessment.

The taxpayer's reference to two decisions of the Illinois Supreme Court is similarly unavailing. In *People ex rel. Toman v. Olympia Fields Country Club*, 374 Ill. 101, 28 N.E.2d 109 (1940), no equal protection issue was ever addressed by the court, which described the question presented as one of alleged constructive fraud. The court did embark upon a discussion of the state constitution's requirement of uniformity in taxation, but concluded that this constitutional provision "means uniformity as applied to a class. No prohibition against classification of property and taxpayers into different classes can be read into the [Illinois] Constitution." 28 N.E.2d at 110.

A case construing the uniformity clause of a state constitution is not relevant to the fourteenth amendment concerns which may be addressed by a federal court. *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 368 (1940). Even assuming, however, that *Olympia Fields* were in some way relevant to the issue presented in the case at bar, it could serve only to refute the theory which the taxpayer advances to this Court. The Illinois Supreme Court plainly held that the assessments were proper in the former case because the comparable properties cited by that taxpayer were, in fact, correctly placed in different classifications. The same justification exists for the assessment which the taxpayer in the present case is now challenging.

Finally, in *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 119 N.E.2d 215 (1954), the state supreme court examined a taxing scheme which did establish

different modes of taxation for foreign and domestic companies. However, the tax burdens imposed by the differing statutory provisions were substantially equal; as the complaining taxpayer could not show any adverse impact to it, the court held that this taxpayer had no standing to raise an equal protection challenge. 119 N.E.2d at 219. Moreover, the court went on to observe that any discrimination imposed by these tax laws was justified on the basis of the valid classifications of the different types of taxpayers. Contrary to the characterization of this decision in the petition pending before this Court, the *Warren Petroleum* Court acknowledged that, even if the taxpayer in that case had alleged substantial discrimination against it, such discrimination "must be upheld as based upon a reasonable difference in circumstances between the appellee and domestic car line companies." 119 N.E.2d at 220.

In the present case, the taxpayer's omission of any challenge to the State's classifications of real property requires the conclusions that the classifications are constitutional and that no substantial federal question can be raised against the statutory scheme under these circumstances. Therefore, no reason exists for the grant of certiorari.

CONCLUSION

For the foregoing reasons, the Property Tax Appeal Board of the State of Illinois respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 87-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUPAGE BANK AND TRUST COMPANY,
as Trustee of Trusts Nos. 2602 and 2439,

Petitioner,

vs.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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RULE 28.1 DISCLOSURE

See Petition for Writ of Certiorari

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REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Illinois' Brief in Opposition is inaccurate in two of its premises. It then goes on to base its argument on the faulty assumptions. For this reason, reply is necessary.

I.

THE PROPERTIES COMPARED WERE FOUND TO BE ADMITTEDLY COMPARABLE.

Illinois' brief refers to the "alleged similarities" between the taxpayer's property and other parcels with lower taxes. The brief states that no findings as to such similarities were made. Illinois intimates that the substance of the comparable properties was not proved to be similar to the subject, thus justifying the difference in taxes.

To the contrary, McHenry County, the adverse party to the taxpayer at the hearing, submitted the single comparable property for comparison. It was in a different class from the subject parcel. The taxpayer admitted that the property was nearly identical to the subject and went on to prove the tax disparity between the two. See page 4 of Petition for Writ of Certiorari.

Further, the Circuit Court's opinion found, "The facts in this case are largely uncontested." The subject was assessed at $4,262 per acre while the "admitted comparable properties were assessed at a flat rate of approximately $300 per acre. The justification given by the State for this discrepancy was that the subject was technically in a different 'class' from the comparables. . ." [emphasis

added]. See Appendix, page 12a, to Petition for Writ of Certiorari.

This particular finding was never appealed by the State and was finally adjudicated by the Circuit Court. In its appeal to the Appellate Court, the State based its objection on the fact that because the properties were in different classes, they could not be compared under any circumstances. That position was sustained by the Appellate Court. (Appendix, page 8a). That is the issue before the Supreme Court.

It is important that the distinction be understood. The subject is admittedly essentially identical to other properties which, for technical reasons, are properly in different assessment classes. The taxpayer contends that because the properties are the same in substance, the form of the classification cannot be used to justify a grossly disparate tax burden of 26 times.

The State fails to offer any explanation of how the *Walters* test should be applied to highly similar, but differently classified, properties. Rather, Illinois begs the question by arguing that the properties have to have some difference or else they would not be in separate classes, and the fact of a different class, *ipso facto*, justifies a different tax. This facile argument fails to acknowledge that two highly similar lands have vastly different tax burdens solely because of their difference in classification.

Both *Walters* and *Hanover* suggest that once the taxpayer shows a gross tax disparity *between* different classes of similar properties, then the taxpayer has standing to have his higher tax declared unconstitutional as a matter of Equal Protection. *Walters v. City of St. Louis*, 347 U.S. 231, 98 L. Ed. 660, 665 (1954); *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, 508, 71 L. Ed. 372 (1926).

Here, the State attempts to justify the tax disparity by arguing that there are real and substantial differences between the properties. The record, however, shows the Respondents, themselves, submitted into evidence the comparable property. The property was admitted to be substantially similar by the taxpayer; the Circuit Court found the properties were admittedly comparable; and the State cannot now be heard to claim otherwise.

II.

THERE IS NO NECESSITY FOR THE TAXPAYER TO INVALIDATE OTHER CLASSES OF WHICH IT IS NOT A MEMBER.

The State's brief suggests for the first time in this entire litigation that the taxpayer cannot assert an Equal Protection claim to contest its own tax unless it first successfully attacks and invalidates the other statutory classes of which the taxpayer is not a member. Illinois goes on to argue that because the legislature had a legitimate governmental purpose for establishing the other classes, the taxpayer cannot succeed in attacking those classes. It concludes withe the *non sequitur* that because there is a rational basis for the other tax classes, this taxpayer cannot complain about its own tax in its own class.

Aside from this argument being barred for being first raised on appeal, it should be apparent that this taxpayer has no interest in attacking other classes. This litigation poses no threat to continued favorable tax treatment to lands classed as farmlands or open space. Those classes will remain intact regardless of the outcome of this litigation.

The issue has never been whether the other classes were valid, but whether this property, which was admitted

to be essentially identical to properties in those classes, can bear a grossly disparate tax solely because it is in a different class. The State's brief has obfuscated this issue.

The taxpayer agrees that Equal Protection will allow a different tax treatment between two highly similar, but differently classified, properties. However, under those circumstances, Equal Protection will not allow the mere form of the classification to justify a gross disparity in the tax burden.

This was the precise issue *Hanover* addressed when it held that the test of constitutionality did not turn on the form of the tax class. Instead the Court "must regard the substance rather than the form. . ." to determine whether the level of taxation between similar classes was constitutionally valid. *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, 509, 71 L. Ed. 372 (1926). The State's suggestion that *Hanover* does not impose such a test is incorrect.

Hanover, correctly interpreted, means the State can invent any form or system of tax classification it sees fit. However, Equal Protection still requires a substance over form test to compare the underlying taxes on properties which are similar in substance but classed differently as a matter of form. The State's argument that the mere fact of a difference in classification will justify a difference in tax is correct, but it fails to account for how different the tax may be if there is no significant difference between the properties in the two classes. Equal Protection requires that the tax burdens be compared in relation to the similarities between the classes.

CONCLUSION

The Petitioner prays that this Court grant the Petition for a Writ of Certiorari and, upon review, reverse the decision of the Appellate Court of Illinois and reinstate the judgment of the Circuit Court for the taxpayer on the constitutional issue.

Respectfully submitted,

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